SABAH BANK BHD.

v.

PEMBORONG KENINGAU SDN. BHD. & ORS.

HIGH COURT BORNEO, KOTA KINABALU
SYED AHMAD IDID JC
[CIVIL SUIT NO. K. 50 OF 1989]
17 JULY 1991

CONTRACT: *Loan facilities - Guarantee and deed of assignment - Whether given to different entity - Whether proper notice of demand.*

CIVIL PROCEDURE: *Lawyers making affidavits - Whether authorised - Should not include contentious material - Summary judgment - Rules of the High Court 1980, O. 14 r. 1.*

The plaintiff bank granted two banking facilities to the first and second defendants, totalling RM2.2 million. The two facilities were secured by guarantees and a deed of assignment. The defendants defaulted and the plaintiffs filed this action for an O. 14 judgment.

The defendants contended that they were not the proper party to be sued, alleging that the agreement was made with a completely different legal entity. The defendants also contended that the plaintiffs did not issue proper notices of demand against the 3rd to the 9th defendants prior to the action. The defendants also alleged that the plaintiffs had breached the terms and conditions of their letters of offer.

The plaintiff also objected to the affidavit made by the defendants' Counsel.

Held:

[1] Affidavits are personal to those who depose them and if statements therein are incorrect, the deponents must be held liable (and, in appropriate cases, punishable under the Penal Code). So it is not the business of anyone else he is so authorised, to depose to facts and much less for Counsel to include contentious materials in their affidavits. Affidavit objected to by plaintiff to be deleted from records.

[2] It is not necessary at this stage of the proceedings for the Court to deal with the merits of the issues involved in this case. The Court merely had to consider whether or not there were issues or questions in dispute which ought to be tried. This was not a plain and obvious case in which summary judgment should be given.

[Plaintiff's application dismissed with costs.]

Cases referred to:

Million Group Credit Sdn. Bhd. v. Lee Shoo Khoon & Ors. [1985] CLJ (Rep) 575 ***(cit)***
Seng Huat Hang Sdn. Bhd. v. Chee Seng & Co. Sdn. Bhd. [1985] CLJ (Rep) 760 ***(cit)***
Lin Securities (Pte) v. Noone & Co. Sdn. Bhd. (Klang Jaya Bahru Dvpt. Bhd. Third Party [1989] 1 MLJ 321 ***(cit)***
Coutts & Co. v. Browne-Lecky & Ors. [1947] ***(cit)***
United Malayan Banking Corp. Bhd. v. Palm & Vegetable Oils (M) Sdn. Bhd. & Ors. [1983] 1 MLJ 206 ***(foll)***
Dvpt. & Commercial Bank Bhd. v. Almas Motors Corp. (M) Sdn. Bhd. & Ors. [1988] 3 MLJ 229 ***(cit)***
Sabah Bank Bhd. v. UMW (East Malaysia) Sdn. Bhd. [1991] 3 CLJ (Rep) 692 ***(cit)***

Legislation referred to:
Contracts Act 1950, ss. 92, 94
Rules of the High Court 1980, O. 14 r. 1

Other source referred to:
Pollock & Mulla (10th Edn.,) p. 753

For the plaintiffs - Raymond Wong; M/s. Nicholas Fung Tokuzip & Co.
For the defendants - Chong Kah Kiat; M/s. Shelley Yap Leong Tseu Chong Chia & Co.

JUDGMENT

Syed Ahmad Idid JC:

The plaintiffs are duly licensed bankers in Malaysia and they operate a branch at 4, 5 & 6, Block K, Sinsuran Komplex, W.D.T. No. 132, 88999 Kota Kinabalu, in the State of Sabah, Malaysia.

The plaintiffs claim against the 1st and 2nd defendants jointly and severally:

(i) The sum of RM2,260,702.06;

(ii) Interest at the rate of 11% per annum from the 1st day of October 1988 to the date of payment;

(iii) Costs; and

(iv) Any other just relief;

and as against the 3rd, 4th, 5th, 6th, 7th, 8th and 9th defendants jointly and severally:

(i) The sum of RM2,200,000;

(ii) Interest; and

(iii) Costs.

On 7 May 1991, the Court heard the application by plaintiffs for an order under O. 14 r. 1 of the Rules of the High Court 1980.

At the start of the proceedings, Mr. Raymond Wong for plaintiffs objected to the defendants' affidavit-in-reply sworn to by Gerard Math on 17 October 1990 on the grounds (1) that paras. 1 and 2 did not state the source of information on which the lawyer had deposed; and (2) it did not say that Counsel was authorised to make this affidavit on behalf of the 4th defendant; (3) in instances where the facts are contentious, for example, in respect of para. 5(3) of the affidavit, the lawyers for the defendants are not entitled to depose any affidavit on their behalf.

Two authorities were cited in support;

(1) *Million Group Credit Sdn. Bhd. v. Lee Shoo Khoon & Ors.* [1985] CLJ (Rep) 575 at 578 where Shankar J said:

> A second point which needs to be emphasized is that the practice of solicitors themselves filing contentious affidavits in pending applications should be discouraged. The parties are the litigants and it is they who should be giving evidence. The rules relating to conduct and etiquette in the profession quite clearly say that a solicitor should not appear as such in a matter in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact. (See r. 28 of the Legal Profession (Practice and Etiquette) Rules 1978).

(2) *Seng Huat Hang Sdn. Bhd. v. Chee Seng & Co. Sdn. Bhd.* [1985] CLJ (Rep) 760 which quoted the *Million Group* (*supra*).

This point took the learned Counsel for the defendants by surprise. Nevertheless, Mr. Chong in reply quoted from *Lin Securities (Pte) v. Noone & Co. Sdn. Bhd. (Klang Jaya Bahru Dvpt. Bhd. Third Party)* [1989] 1 MLJ 321 at:

> Held (1) ... No doubt a defendant is bound by the four corners of his pleadings at the trial of the action but he is not so bound at the O. 14 proceedings. Order 14 r. 4(1) provides that a defendant may show cause against an application for summary judgment by affidavit or otherwise. He is entitled to show at the hearing of the O. 14 application that over and above what has been pleaded in the statement of defence he has other defences. The issue at an O. 14 application is whether the defendant has a defence and not whether the statement of defence provides him with a defence.

The Court ruled that the affidavit objected to by the plaintiffs was to be deleted from our records but the learned Counsel for defendants could argue against the O. 14 application. This ruling was made as the plaintiffs' contentions were reasonable. Affidavits are personal to those who depose them and if statements therein are incorrect, the deponents must be held liable (and, in appropriate cases, punishable under the Penal Code). So it is not the business of anyone else unless he is so authorised, to depose to facts and much less for Counsel to include contentious materials in their affidavits.

The Court continued with the plaintiffs' O. 14 application immediately.

According to the plaintiffs, they granted two banking facilities to the 1st and 2nd defendants on two occasions, notably on 18 October 1984 (Exhibit "JCYK.1") and on 19 December 1984 (Exhibit "JCYK.2"). The first banking facility was a temporary overdraft in the sum of RM200,000 and the second was an overdraft in the sum of RM2 million. The first temporary overdraft was secured by a joint and several guarantee dated 20 November 1984 by the directors of the 1st and 2nd defendants (see Exhibit "JCYK.6") and the second overdraft was secured by a deed of assignment assigning the proceeds of the project upon which the 1st and 2nd defendants jointly undertook to complete to the plaintiffs (Exhibit "GM.1") and a joint and several guarantee stamped on 30 January 1985 by the directors of the 1st and 2nd defendants (Exhibit "JCYK.7").

The 1st and 2nd defendants did utilize both the first banking facility offered (Exhibit "JCYK.2") and the second banking facility offered (Exhibit "JCYK.5"). The 1st and 2nd defendants despite repeated demands from the plaintiffs or their solicitors had persistently refused to settle both the outstanding accounts. As a result, the plaintiffs caused to instruct their solicitors namely M/s. Nicholas Fung Tokuzip & Co., to demand payment from the 3rd, 4th and on to the 9th defendants to pay the outstanding balance in pursuance of the two joint and several guarantees signed by them. However, despite several reminders, the 3rd to the 9th defendants as guarantors have refused to settle or respond. The total outstanding inclusive of interest for 1st defendants as of 30 September 1988 stood at RM2,260,702.06 (Exhibit "JCYK.5").

Out of the several issues, we can confine for the purpose of this judgment to these few.

(i) Firstly, the defendants said there were no agreements made between the 1st and 2nd defendants of the one part and the plaintiffs of the other part in respect of the two overdraft facilities the subject matter of this case. The two agreements as relied upon

by the plaintiffs were actually made by the plaintiffs with a completely different legal entity though formed by the 1st and 2nd defendants but recognised by the plaintiffs which entity was called:

"Pemborong Keningau Sdn. Bhd./Pembinaan C.M. Sdn. Bhd. Joint Venture Partnership."

(ii) The defendants claimed that they had proof of this by the letters of offer dated 18 October 1984 and 19 December 1984 in exhibits marked "JCYK1" and "JCYK3" of the affidavit of Joseph Chai Yun Kiong of the plaintiffs. The letters were specifically addressed to the managing director of the joint venture company. The letters could not be to two persons, that is to say, to the managing director of the 1st defendant company and to the managing director of the 2nd defendant company. Neither could they simply be construed as the plaintiffs granting the two overdraft facilities to and for the benefit of the 1st defendants and the 2nd defendants jointly and/or severally.

(iii) When we see the plaintiffs' ledger account in exhibit marked "JCYK2" of the same affidavit where an entity clearly not, and different from, the 1st defendants and the 2nd defendants was stated thereon. It was captioned "Pemborong Keningau Sdn. Bhd. (Joint Venture Pembinaan C.M. Sdn. Bhd.)".

(iv) In fact, the plaintiffs cannot deny that the banking account then had with them was specifically in the name of a joint venture company which was neither the account of the 1st defendants nor that of the 2nd defendants. Neither defendants had any exclusive rights to operate the said account nor had the benefit of the two overdraft facilities individually.

(v) The second issue was on whether or not there was any prior demand, and if so, whether the notices which had been made to the 3rd to 9th defendants were proper. The defendants said there were no proper notices of demand issued to the 3rd to 9th guarantors (or defendants here) specifically stating the exact amount on which the 3rd to 9th defendants were liable under the first guarantee. The defendants claimed that all that the plaintiffs did was to have issued notices (which they said were demands) combining the first and second guarantees. If the 1st and 2nd defendants were wrongly named as parties in this suit, the 3rd to 9th defendants could not be liable under a guarantee where no principal or principals are liable. The Court reminds itself of the principles in *Coutts & Co. v. Browne-Lecky & Ors.* [1947].

(vi) In respect of the second guarantee, unlike the first guarantee dated 20 October 1984, the defendants claimed that it was for advances to the 1st and 2nd defendants. Parties can see and compare the two guarantees in exhibits marked "JCYK6" and "JCYK.7" of the affidavit of Joseph Chai for the plaintiffs. The first guarantee was specifically stated as given by the 3rd to 9th defendants for advances to be granted to the joint venture entity whereas the second guarantee was specifically stated as given by the 3rd to 9th defendants for advances to the 1st and 2nd defendants.

(vii) The defendants asked that even if the 3rd to 9th defendants were to be held liable under the two guarantees, their liability under the second guarantee must be discharged on the grounds that the plaintiffs had breached the terms and conditions of their letter of offer dated 19 December 1984 in that no adequate securities were obtained by the plaintiffs before releasing the monies to the joint venture company's account. This jeopardised the 3rd to 9th defendants' rights to recourse.

(viii) Learned Counsel submitted that the plaintiffs had been negligent in not obtaining valid and/or proper assignment from the joint venture company or from the 1st and 2nd defendants. There was also no valid or proper deed or assignment/letter of undertaking obtained by the plaintiffs from Sadong Development Sdn. Bhd. The plaintiffs disclaimed any such duty for them to obtain additional or adequate securities for the 3rd to 9th defendants. Even if there was such a duty (which they denied) it would have to be clearly stated in the letter of guarantee that it was a condition precedent that the plaintiffs were to obtain proper or additional or adequate securities before the plaintiffs were allowed to enforce the guarantee. It was submitted that ss. 92 and 94 of the Contracts Act must accordingly arise against the plaintiffs. See also *Pollock & Mulla* (10th Edn.,) at p. 753.

Conclusion

I shall not deal with the continuing guarantee, characteristics of the guarantee and whether or not there had been advances. These were not dealt directly by defendants.

On the whole, the Court finds good reason to follow the Federal Court in *United Malayan Banking Corp. Bhd. v. Palm & Vegetable Oils (M) Sdn. Bhd. & Ors.* [1983] 1 MLJ 206 where at p. 208 it said:

> We have not dealt in any detail with the facts and particulars of several allegations made on both sides as it is not our province to touch on the merits of the issues involved. We only need to consider whether or not there are issues or questions in dispute which ought to be tried. Summary judgment is only given in a plain and obvious case. This is certainly not one.

In *Dvpt. & Commercial Bank Bhd. v. Almas Motors Corp. (M) Sdn. Bhd. & Ors.* [1988] 3 MLJ 229 the Court held that the invocation of ss. 92 and 94 as well as the issue of negligence all provided triable issues. Further, as Mr. Chong had stated in our instant case, Courts "frown upon imprudence and non-performance of the parties' legal duties." (quoted from *Sabah Bank Bhd. v. UMW (East Malaysia) Sdn. Bhd.* [1991] 3 CLJ (Rep) 692 (at p. 710)).

Guarantors are to be treated favourably. All terms to their advantage must be observed. It is they who facilitate the financiers and banks into lending and it is only just and proper for financial institutions and banks (and other lenders) to ensure that their obligations are adhered to and all notices are sent out correctly.

I therefore dismiss the plaintiffs' application with costs.

Also found at [1991] 3 CLJ 2590